Penang & S Prai Textile & Garment Industry Employees' Union v Dragon & Phoenix Bhd Penang & Anor

HIGH COURT (KUALA LUMPUR) – ORIGINATING MOTION NO R8-32-12-88
MOHAMED YUSOFF J
23 JANUARY 1989

Administrative Law – Order of certiorari – Application for – Industrial Court's decision that check-off is not trade dispute under s 2 of Industrial Relations Act 1967 – Refusal of Industrial Court to incorporate check-off provision in award – Whether Industrial Court committed jurisdictional error – Code of Conduct for Industrial Harmony – Legal effect of Code – Interpretation of s 30(5A) of Industrial Relations Act 1967 – Industrial Relations Act 1967, ss 2 & 30(5A)

A dispute arose from a re-negotiated collective agreement between the applicant trade union and the first respondent. A check-off provision (a provision allowing the employer to deduct trade union subscriptions from the employee's wages and remitting them to the union by the employer) existed in the previous agreement but upon re-negotiation, the first respondent refused to accede to incorporate it in the new agreement. The matter was then referred to the Industrial Court which decided that check-off is not a trade dispute under s 2 of the Industrial Relations Act 1967 ('the Act').

The applicant applied to the High Court for an order of certiorari to quash the award of the Industrial Court on the basis that the court committed a jurisdictional error in its holding. The applicant argued that: (a) by declining to exercise jurisdiction in refusing to incorporate the check-off provision into the court's award, the Industrial Court had committed jurisdictional error; (b) the Industrial Court failed to give proper interpretation and effect to s 30(5A) of the Act. With regard to the second contention, the applicant placed heavy reliance on the Code of Conduct for Industrial Harmony which was approved by the minister in 1975 which expressly provided for matters such as check-off.

Held, dismissing the application:

(1) The court is in agreement with the Industrial Court. The decision of the Federal Court in *Non-Metallic Mineral Products Manufacturing Employees Union* v *Malaya Glass Factory Bhd*[1] is binding on the Industrial Court and on this court as well. The Industrial Court is barred from incorporating check-off in its award in spite of s 30(5A) of the Act.

(2) Although such matter as check-off is expressly provided in the Code of Conduct for Industrial Harmony, its acceptance is voluntary. There is no legal force or sanction for failing to accept such Code of Conduct and Code 35 itself (which states that collective agreements may also cover matters such as 'the deduction by management of trade union subscriptions etc from employees' wages') is expressed in permissive terms. It would be futile for the applicant to enforce the term of check-off, which they themselves had to consent to in writing, on the first respondent without its agreement.

(3) Section 30(5A) of the Act only allows the court to consider any agreement or such Code of Conduct in its award. But the section speaks in permissive terms and in interpreting it, the Industrial Court adopted the first respondent's contention that the section does not alter the position that a check-off is not a trade dispute within the meaning of the term as defined in s 2 of the Act and therefore the section does not confer extra jurisdiction on the court to award check-off.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 382 of 1988.]

Case referred to

1 *Non-Metallic Mineral Products Manufacturing Employees Union* v *Malaya Glass Factory Bhd* [1985] 1 MLJ 129 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 2, 30(5A), 32(3)(a)

KP Gengadharan for the applicant.
Andrew Saw for the first respondent.

Cur Adv Vult

Mohamed Yusoff J: The only question arising in this motion for an order of certiorari to quash the award of the Industrial Court dated 24 December 1987 is whether the court committed jurisdictional error in holding that check-off is not a trade dispute under s 2 of the Industrial Relations Act 1967 ('the Act').

It is argued firstly that by declining to exercise jurisdiction in refusing to incorporate this check-off provision into the court's award, it has committed jurisdictional error. Secondly, it is said that the court failed to give proper interpretation and effect to s 30(5A) of the Act and thus declined its jurisdiction. This dispute arose from a re-negotiated collective agreement between the applicant trade union representing the workers and the first respondent, the employer. Check-off provision existed in the previous agreement but upon re-negotiation the first respondent refused to accede to incorporate it in the new agreement. Through the relevant minister the matter was referred to the Industrial Court under s 26 of the Act.

Check-off is a deduction by the management (employer) of trade union subscriptions from employees and remitting them to the union by the management. An essential feature of the arrangement is a written consent by the employees for such arrangement.

In *Non-Metallic Mineral Products Manufacturing Employees Union* v *Malaya Glass Factory Bhd*[1] the then Federal Court had occasion to consider a similar issue and it was held that the Industrial Court acted outside its jurisdiction in ordering the company there to deduct the union's subscription of workers. At p 130 the court holds:

> The first is art 6: 'Check-off'.
>
> The appellants thereby sought to get the respondents to deduct union subscriptions from union members who have authorized the company (respondents) to do so. Encik Gengadharan says that this is a continuation of what was already in practice under the previous agreement and therefore cannot be in excess of jurisdiction.

On behalf of the respondents it was argued that this item is not a trade dispute as defined in s 2, ie it is not connected with the employment or non-employment or the terms of employment or the conditions of work. It is not a condition of service. The previous collective agreement, continued Encik Chelliah, was a separate matter so that the court acted in excess of jurisdiction.

He cited *The Queen* v *Portus & Anor* (1972) 127 CLR 353 as authority for the proposition that consensual practice of employees and employers cannot expand the jurisdiction of the tribunal. We are inclined to agree with him, and would hold that the tribunal was, on this matter, acting outside its jurisdiction.

Relying on the *Non-Metallic Mineral* case[1] the Industrial Court in this case rejected the applicant's claim. I am in agreement with the Industrial Court. The decision of the Federal Court in the *Non-Metallic Mineral* case[1] is binding on the Industrial Court and indeed on this court as well.

Now, learned counsel on behalf of the applicant contends that the *Non-Metallic Mineral* case[1] is no longer good law as the Federal Court was concerned only with the state of the law prior to May 1980 when the amendment to the Act was effected. I do not agree with the learned counsel's view. The Federal Court's concern with the state of law prior to May 1980 as expressly stated in the judgment relates to s 32(3)(a) only. That provision dealt with finality of the Industrial Court's award which was then repealed by the May 1980 amendment. In my opinion that amendment to s 32(3)(a) has no relevance to the similar issue decided there.

Another amendment to the Act in May 1980, which is relevant to this case, relates to the definition of the words 'trade disputes' in s 2 of the Act. The amendment takes away from the definition the disputes as between workmen and workmen and between employers and employers but retains trade disputes as between employer and his workmen. The 1980 amendment thus confined the Industrial Court's jurisdiction to disputes between the employers and workmen only. The present case is such a dispute. With respect and in this view, the *Non-Metallic Mineral* case[1] is still binding and the Industrial Court award is correct.

On the second argument, that the Industrial Court failed to give proper interpretation and effect to s 30(5A) of the Act and thus declined jurisdiction, learned counsel placed heavy reliance on the Code of Conduct for Industrial Harmony which was approved by the minister in 1975. Code 35 of that Code of Conduct states that collective agreements *may* also cover such matters as:

(c) the deduction by management of trade union subscriptions etc from employees' wages;

Although such matter as check-off is expressly provided in the Code of Conduct for Industrial Harmony, its acceptance is voluntary. This is so expressed by the minister in his foreword to the Code. There is no legal force or sanction for failing to accept such Code of Conduct and Code 35 itself is expressed in permissive terms and in my view it would be futile for the applicant to enforce the term of check-off, which they had themselves to consent in writing, on the first respondent without its agreement.

As regards the Industrial Court's interpretation of s 30(5A) of the Act, the section only allows the court to consider any agreement or such Code of Conduct in its award. But again the section speaks in permissive terms and in interpreting it the Industrial Court adopted the first respondent's contention that the section does not alter the position that a check-off is not a trade dispute within the meaning of the term as defined in s 2 of the Act and therefore the section does not confer extra jurisdiction on the court to award check-off.

I am, again, in agreement with the Industrial Court that in view of the *Non-Metallic Mineral* case[1] on check-off, the Industrial Court is barred from incorporating it in its award in spite of s 30(5A) of the Act. I hold that the Industrial Court has correctly declined jurisdiction in this case.

For these reasons, I dismissed this application.

Application dismissed.

Solicitors: *Genga Maha Wong & Co*; *Ng Yook Woon, Andrew TC Saw & Co.*

Reported by *Ng Sheau Jiuan*

United Manufacturers Sdn Bhd v Sulaiman bin Ahmad & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C506 OF 1983
GUNN CHIT TUAN J
21 JANUARY 1989

Hire Purchase – Notice of intention to repossess vehicle under hire purchase – Whether time limit exists as to when owner must repossess after service of notice – Hire Purchase Act 1967, s 16(1)

Hire Purchase – Notice under s 16(3) of Hire Purchase Act 1967 – Service of – Modes of service – What constitutes prima facie proof of service under Hire Purchase Act 1967 – Hire Purchase Act 1967, ss 43 & 44

Civil Procedure – Triable issues – Bare denials to plaintiff's claim – Denials not substantiated – Whether bare denials can constitute triable issues

By a hire-purchase agreement, the plaintiff let to the first defendant on hire purchase a tractor. The first defendant fell into arrears of hire rentals and was also indebted to the plaintiff